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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

FRANK J. SCHIFFNER,

Petitioner,

v.

MOTOROLA, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

Motorola raises new arguments in its Brief in Opposition to Schiffner's Petition ("Opp."). Those points have been argued below and the Appellate Court did not find sufficient merit in them to even mention them in passing. Because of the importance Motorola places in their positions, and their potentially misleading effect, Petitioner makes this short reply.

I.

THE FDA'S DISCUSSION OF RISKS FROM EMF RADIATION EVIDENCES APPROVAL OF STATE REGULATION.

Motorola's argument that a FDA "Talk Paper", issued on February 4, 1993, supports preemption of the concerned marketing, misrepresentation and consumer claims (Opp. at 15), demonstrates its misunderstanding or misrepresentation of preemption. Any contention that the FDA intended that its nonregulation of performance aspects of cellular portable telephones in 1993 constituted an affirmative decision that no regulation at all was permitted is not supported by the language of the talk paper itself, by existing law, or by reference to statements of sister agencies. Reference to the talk paper, as Motorola has made, is questionable as the complained-of transaction took place in 1990, three years before the talk paper was issued.

The talk paper was cited by Motorola in the lower courts, as well as argued in *Verb v. Motorola*, 284 Ill. App. 3d 460 (1st Dist. 1997), and has failed to convince any judge that it was a statement that the FDA had made a preclusive and preemptive decision that no

regulation of cellular portable phones was necessary. The talk paper discusses concerns over potential problems surrounding radiation emitted by cellular portable phones. The FDA states, in a question and answer form, that there is evidence that suggests that low level radiation (cellular portable phone frequencies) may cause adverse health effects. FDA Talk Paper No. 793, *Update on Cellular Phones, February 4, 1993.* In fact, the FDA states that:

> Nonetheless, we cannot dismiss the studies as irrelevant to cellular portable phone users. We simply don't have enough information at this point to rule out the possibility of a risk.

The FDA also notes that it was its position that there was not enough evidence to know for sure either way and that the necessary human studies did not exist at that time. *Id.*

This is a far cry from a federal agency making an affirmative decision that no regulation is necessary on any level. Preemption of state law claims as a result of an agency decision not to act would destroy our system of federalism. *Hillsborough County, Florida v. Automated Medical Labs., Inc.*, 471 U.S. 707, 717 (1985).

> [B]ecause agencies normally address problems in a detailed manner and can speak through a variety of means, including regulations, preambles, interpretive statements, and responses to comments, we can expect that they will make their intention clear if they intend for the regulations to be exclusive.

Id. at 718.

Where the lack of a federal standard results from a preliminary observation that insufficient data exists to

justify regulation, as is the case here, a court should not imply an intent to preempt by non-regulation. *See In re Ford Motor Company Bronco II Products Liability Litigation,* 909 F. Supp. 400, 408 (E.D. La. 1995). Additionally, where the referenced agency acknowledges the possibility of a risk, but takes no position, other avenues of redress for the public such as access to the common law and state statutes should not be eliminated.

Reference to the FCC non-regulation of cellular portable phones further demonstrates the inaccuracy of Motorola's "exclusivity" argument. The FCC also has some regulatory authority over cellular portable phones.[1] In 1996, the FCC issued a report and order titled, *In the Matter of Guidelines for Evaluating the Environmental Effects of Radio Frequency Radiation*, FCC 96-326, 61 Fed. Reg. 41006, 41007 (Aug. 7, 1996). The FCC, as contemplated by *Hillsborough County*, expressly stated its position on federal preemption, stating:

> In the past, parties have requested that the Commission preempt state and local authority over RF exposure matters. To date the Commission has declined to preempt on health and safety. However, the Commission has noted that

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[1] That the FCC has any authority to regulate aspects of cellular portable phones eviscerates Motorola's and the Appellate Court's position that the "exclusive" power to regulate cellular phones rests with the FDA. In fact, Motorola argued in *Verb v. Motorola*, 284 Ill. App. 3d 460, that the claims there were preempted by the FCC, a position expressly rejected by the *Verb* Court. Motorola concedes the FCC has regulatory power over "health and safety" by its reliance on the FCC report and order, yet boldly contends that the FDA's power in this area is somehow "exclusive." Compare Opp. at 13 with Opp. at 14.

> should non-Federal RF radiation standards be adopted that adversely affect a licensee's ability to engage in Commission authorized activities, the Commission would consider reconsidering whether Federal action is necessary.

FCC Report and Order 96-326 at par. 164 (footnotes omitted). This non-preemption position was based upon the Commission's hesitation to intrude on the ability of states to make regulations regarding health and safety, *id.* at par. 166, and a traditional reluctance to preempt state regulations enacted to promote health and safety. *Id.* at par. 167.[2] The FCC report and order demonstrate why the mere existence of the Environmental Products Radiation Control Act, 21 U.S.C. §kk ("EPRCA"), does not preempt these claims and how the FDA could have and should have addressed the issue if it intended to preempt these claims.

Moreover, Motorola does not accurately state the nature of the claims brought by Schiffner. These claims are concerned with the marketing and sale of the cellular portable phone purchased by Schiffner. His damages are economic; he is not claiming any personal injury. His breach of warranty and Magnuson-Moss claims concern the terms of the contract for sale between him and Motorola. The most expansive preemption laws do not preempt the contract action seeking to

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[2] In fact, the FCC expressly wrote to plaintiff's counsel stating that its regulations did not preempt state law. "[T]he Commission has not at this time preempted the exercise of additional state law remedies premised on individuals' exposure to levels of RF radiation." Fourth Amended Complaint at Exhibit 6.

enforce the bargain between the parties. *See American Airlines v. Wolens*, 513 U.S. 219 (1995).

II.

MOTOROLA WAIVED UNRAISED ARGUMENTS OF "OTHER GROUNDS" FOR DISMISSAL BY NOT RAISING THEM IN THE TRIAL COURT.

In its effort to sway this Court from addressing the impact of the ruling below on fundamental preemption doctrine, Motorola goes to great lengths to claim that there are other state law grounds supporting dismissal of Schiffner's complaint. Opp. at 10-11. While Schiffner disputes Motorola's position, Motorola has waived these points for review. Clearly, the Appellate Court did not address these arguments by Motorola because they were raised for the first time on appeal and were never made in the trial court. The only grounds raised by Motorola in the trial court were preemption and compensable injury and those are the matters which form the basis of the Appellate Court opinion. This Court should not be the forum for Motorola to first present its demurrer.[3]

Under Illinois law, new grounds for dismissal may not be raised for the first time in the appellate court. *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536-40 (1996), *rehearing denied, certiorari denied,* 117 S.Ct. 274 (1996). The Illinois courts can and will deal with any remaining issues of state law in this case once it is

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[3] Even were Motorola correct, which it is not, the trial court could allow an amendment of the pleadings to correct pleading deficiencies.

remanded. *See* R. Stern, *et al., Supreme Court Practice* §3.24 at p. 157 (7th edition, 1993). (State law questions will be remanded for consideration by the state court.)

Moreover, Motorola wrongly relies on, *Supreme Court Practice*. Opp. at 10. The "Important Constitutional Issues" section Motorola cites hardly applies to the situation here where the case was decided on federal law and where the appellate court upheld the state law basis for the causes of action. Notably, Motorola cites no case even remotely similar to the procedural setting presented here. The treatise does, however, support the grant of *certiorari*. In the jurisdictional section discussing "Adequacy of State Grounds", the authors note that the purported state ground must be a tenable one.

> . . . Supreme Court review cannot be evaded by reliance on a state ground so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the federal question.

Id. at §3.24 p. 153. Motorola's arguments are such a device seeking to avoid review of the federal question clearly framed by the Appellate Court ruling. Motorola cites nothing in *Supreme Court Practice* which is a reference to the procedural posture here, where the state court has decided the case on only federal grounds and upheld the validity of the state claims. Presently, the opinion below eliminates the validly stated claims of Petitioner, and the putative class he seeks to represent, through the FDA's alleged "exclusive" right to regulate.

CONCLUSION

For the reasons stated herein and those in the Petition, Petitioner respectfully requests that this Court grant his Petition for Certiorari.

Respectfully submitted,

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